MISSOURI SUPREME COURT

LAWRENCE MICKEY, *Plaintiff-Respondent*, v. BNSF RAILWAY COMPANY and, SAFECO INSURANCE COMPANY OF AMERICA, *Defendants-Appellants*.	No. SC93591

Appeal from the 22nd Judicial Circuit
Hon. John J. Riley, Presiding
No. 0822-CC-1667

SUBSTITUTE BRIEF OF RESPONDENT

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STATEMENT OF FACTS

Lawrence Mickey worked for the BNSF Railway Company for 40 years. *Mickey v. BNSF Ry.*, 358 S.W.3d 138, 140 (Mo.App. 2011). BNSF's negligence caused Mickey to suffer permanent disabilities in his back and knees. In 2008 Mickey filed a petition against BNSF under the Federal Employers' Liability Act (FELA, 45 U.S.C. §§51–60) to recover damages for his injuries. LF 14.[1] In February 2010, a jury found BNSF liable for Mickey's injuries and awarded him $345,000 in damages. LF 20; *Mickey*, 358 S.W.3d at 140–41. On the same day, the trial court entered judgment in favor of Mickey against BNSF for $348,731 (accounting for interest and taxable costs). LF 21–24. BNSF appealed the judgment and obtained a stay of execution by posting a supersedeas bond issued by Safeco Insurance Company of America. LF 43–44. The Court of Appeals for the Eastern District rejected BNSF's appeal and affirmed the judgment in all respects on November 29, 2011. *Mickey*, 358 S.W.3d at 141–45.

BNSF did not pay the judgment. Instead, on April 2, 2012, BNSF filed a complaint in interpleader in the United States District Court for the Eastern District of Missouri by which it sought to deposit $12,821 that it contended was claimed by the Internal Revenue Service and the United States Railroad Retirement Board as taxes due on Mickey's judgment. LF 124–31; *BNSF Ry. v. Mickey*, No. 12-598, Doc. 1 (E.D.Mo. Apr. 2, 2012). By that action BNSF sought to discharge itself from any liability to Mickey for that $12,821. LF 130.

[1] Legal File in the Court of Appeals.

On April 13, 2012 Mickey filed his own motion in the trial court for judgment on Safeco's supersedeas bond, seeking payment of the $387,260 due on his judgment as of April 11, 2012. LF 40–44. Only on April 20, 2012, did BNSF finally pay Mickey $368,481. BNSF withheld $12,821, however, for what it claimed were taxes due on its payment. LF 81–83.

In Federal court, on April 27, BNSF moved for a preliminary injunction to prevent Mickey from attempting to collect the withheld $12,821. *BNSF Ry. v. Mickey*, No. 12-598, Doc. 15 (E.D.Mo. Apr. 27, 2012). The Federal court denied that motion on May 9, 2012. *Id.*, Doc. 20. The court ultimately dismissed the complaint in June 2012. *Id.*, Doc. 27. Neither the Internal Revenue Service nor the Railroad Retirement Board asserted a claim against the $12,821.

On May 11, 2012 BNSF contended in the trial court that it satisfied Mickey's judgment by filing its interpleader action in Federal court over the unpaid $12,821. LF 46, 52, 65. Alternatively, BNSF sought an abeyance of Mickey's motion for judgment on Safeco's bond until the Federal action was resolved. LF 47, 52, 65. BNSF had not yet paid the taxes it contended were due on Mickey's judgment.

On May 24, 2012 the trial court entered judgment in favor of Mickey against Safeco for $12,821. LF 178–80. On May 25, 2012, BNSF and Safeco sought to vacate that judgment on the grounds that BNSF claimed to have now paid the $12,821 to the IRS and that "Mickey's remedy is to pursue any dispute regarding the payment with the IRS." LF 193. The trial court denied that motion on June 8, 2012. LF 209. BNSF (and Safeco) appealed again, after filing yet another supersedeas bond, this one issued by Liberty

Mutual Insurance Company in the amount of $15,000. LF 210–17. BNSF contended on appeal, as it does now, that it had fully satisfied Mickey's judgment by paying only $368,481 and withholding $12,821. BNSF did not appeal the trial court's denial of its motion to vacate the judgment.

The court of appeals again affirmed the trial court's judgment. *Mickey v. BNSF Ry.*, No. ED98647 slip opinion (Op.),[2] 2013 Mo. App. LEXIS 691 (Mo.App. 2013). The court held that once the trial court entered its judgment on the jury's verdict, BNSF could satisfy the judgment "only by payment in full with accrued interest and costs except where a valid release is given or where there is a lawful agreement otherwise providing." Op. at 6, LEXIS at 10 (quoting *Keith v. Burlington N. R.R.*, 889 S.W.2d 911, 925 (Mo.App. 1994)). The court further held that "BNSF did nothing to ensure prior to the entry of the judgment that the judgment entered specify that a portion of the damages awarded to Plaintiff constituted 'pay for time lost'" subject to taxation as BNSF claimed. Op. at 9, LEXIS at 15–16. Finally, the court did not address the taxability of Mickey's judgment because BNSF had failed to present the issue to the trial court before judgment was entered. Op. at 11, LEXIS at 18. It declined to "undertake to review an issue not having been decided by the trial court" because that "would be akin to rendering an advisory opinion, something appellate courts are wont not to do." *Id.* (quoting *Pruitt v. Mo. Dep't of Corr.*, 224 S.W.3d 630, 631 (Mo.App. 2007)).

BNSF's petition for transfer to this Court was granted on October 1, 2013.

[2] http://www.courts.mo.gov/file.jsp?id=62518.

ARGUMENT

Standard of Review. The trial court's judgment on Safeco's bond must be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo.banc 1976); *McLean v. First Horizon Home Loan Corp.*, 369 S.W.3d 794, 799 (Mo.App. 2012). The interpretation of statutes is a purely legal issue that is conducted *de novo. E.g.*, *Hervey v. Mo. Dept. of Corrections*, 379 S.W.3d 156, 163 (Mo.banc 2012). However, any factual findings that must be made to apply the law are to be made by the trial court and those factual findings are entitled to deferential review. *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo.banc 2012)(per curiam).

BNSF contends only that that the trial court erroneously declared or applied the law. It is wrong for two reasons. First, the trial court properly held that it could not amend the original judgment to account for what BNSF claimed to be taxes due after the court of appeals issued its first mandate affirming the judgment. Second, even if the trial court could have considered BNSF's tax argument, that argument was erroneous because Mickey owed no taxes on the judgment amount due him in this case.

I. After remand from the first appeal, the trial court had no authority but to execute the judgment.

As the trial court noted, the appellate court's mandate obligated the trial court to execute the judgment. LF 179. Upon affirmance on appeal, the judgment is law of the case and cannot be challenged or changed. "The decision in the prior appeal 'is the law of the case for all points presented and decided, *as well as for matters that arose prior to the*

first adjudication and might have been raised but were not.'" *Coleman v. Merritt*, 324 S.W.3d 456, 461 (Mo.App. 2010)(quoting *State ex rel. Alma Tel. Co. v. Pub. Serv. Comm'n*, 40 S.W.3d 381, 388 (Mo.App. 2001)). BNSF's argument that some portion of the jury's award of damages under the FELA should have been allocated to taxable wages or should have been paid to the IRS as taxes are just such matters that could have been addressed before the entry of Mickey's first judgment and thus were waived after the court of appeals affirmed the first judgment.

"The law-of-the-case doctrine is 'more than merely a courtesy: it is the very principle of ordered jurisdiction by which the courts administer justice.'" *Id*. (quoting *In re Estate of Corbin*, 166 S.W.3d 102, 106 (Mo.App. 2005)). "Where the judgment of the trial court has definitely determined the rights of the parties and has been affirmed, 'any subsequent orders or adjudications in the cause must be confined to those necessary to execute the judgment.'" *In re Bullard*, 18 S.W.3d 134, 138 (Mo.App. 2000)(quoting *Papin v. Papin*, 475 S.W.2d 73, 76 (Mo. 1972)). The "trial court may not modify or depart from the mandate." *Amburn v. Aldridge*, 296 S.W.3d 32, 33–34 (Mo.App. 2009)(citing *Bullard*, 18 S.W.3d at 138). "Following remand, the trial court is required to render judgment in conformity with the mandate." *Bird v. Mo. Bd. for Architects, Prof'l Eng'rs, Prof'l Land Surveyors & Landscape Architects*, 309 S.W.3d 855, 860 (Mo.App. 2010)(quoting *Pope v. Ray*, 298 S.W.3d 53, 57 (Mo.App. 2009)). "By reason of that judgment, the trial court had the power and duty to enforce it, by execution or otherwise, as it finally stands or should stand, without variation[.]" *Papin*, 475 S.W.2d at 76 (quotation marks and citation omitted).

A "judgment may be satisfied only by payment in full with accrued interest and costs except where a valid release is given or where there is a lawful agreement otherwise providing." *Keith*, 889 S.W.2d at 925. BNSF did not pay the judgment in full, Mickey did not give BNSF any release, and Mickey did not agree to anything other than payment in full of his judgment. Consequently, the trial court properly entered judgment against Safeco on its appeal bond, Mo.R.Civ.P. 81.11, and the court of appeals properly affirmed that judgment.

The time for BNSF to argue that any portion of the damages the jury awarded to Mickey was taxable compensation or that any offset was due for payment of taxes was before the trial court entered judgment on that verdict. BNSF asserted as an affirmative defense that it was entitled to "offset from any judgment entered herein" all "medical benefits, advances, wages, Railroad Retirement Board benefits and/or supplemental sickness benefits" Mickey received, but did not assert that it was entitled to offset taxes it claimed to be due "from any judgment entered herein." LF 18 (¶3). At BNSF's request the jury was specifically instructed that its award was *not taxable*. LF 174 (MAI 8.02). Yet now BNSF contends the award *could be taxable* to some extent, but did not even proffer a jury instruction on that point. BNSF's failure to argue this point before or at trial is a waiver of that argument and it is too late for BNSF to effectively seek a modification of the judgment and the verdict over *three years* after the verdict was rendered. *Coleman*, 324 S.W.3d at 461. Furthermore, at the time the trial court entered judgment on Safeco's bond, BNSF had not yet even paid the putative taxes and the IRS had not even claimed to be entitled to any taxes either in the trial court or in BNSF's federal interpleader.

Because the trial court had no authority to amend the judgment as BNSF belatedly requested after the first appeal of that judgment, the trial court properly entered judgment on Safeco's bond for the balance due on Mickey's judgment.

II. Mickey owed no taxes on the judgment in this case.

BNSF contends it did not need to ask the trial court to specify what portion (if any) of the jury's verdict was taxable "pay for time lost" because as a matter of law the entire amount of the award was taxable. BNSF claims the tax is due under Railroad Retirement Tax Act (RRTA), specifically 26 U.S.C. §3201(a) and (b). *See* Appendix To Substitute Brief Of Respondent Lawrence Mickey at A2 (Resp. App.). The RRTA has been in place since 1937. *Standard Office Bldg. Corp. v. United States*, 819 F.2d 1371, 1373 (7th Cir. 1987). The FELA has been in place since 1908. *CSX Transp. Inc. v. McBride*, 564 U.S. ___, 131 S.Ct. 2630, 2636 (2011). In the nearly 80-year coexistence of the RRTA and FELA, BNSF identifies only one recent decision of a single State appellate court in support of its argument, and that decision is erroneous for the reasons stated *infra* at 24. That utter lack of precedent speaks volumes regarding the merits and novelty of BNSF's argument.

BNSF has paid numerous judgments on FELA general verdicts. In 2008 alone BNSF paid $156,000,000 in injury claims. *See* 2008 Annual Report at 61.[3] Yet, BNSF identifies not even a single demand from the IRS for payment of RRTA taxes allegedly due on

[3] http://www.bnsf.com/about-bnsf/financial-information/annual-reports-and-proxy-statements/pdf/2008annrpt.pdf.

those judgments, much less identifies any tax payments it has made on those judgments or precedential decisions allowing such tax payments to be made in lieu of satisfaction of such judgments. Indeed, in two recent Missouri cases, BNSF satisfied general verdict FELA judgments without *any* deduction for RRTA taxes that BNSF claims are due on *all* such judgments. *Martin v. BNSF Ry.*, No. 1016-CV30671 (16th Cir.), Judgment (July 7, 2011), Acknowledgement of Satisfaction (Dec. 15, 2011); *Carter v. BNSF Ry.*, No. 0816-CV16671 (16th Cir.), Judgment (Nov. 27, 2012), Acknowledgement of Satisfaction (Mar. 28, 2013); Resp. App. A30–A41.

This history confirms that RRTA taxes have never been due on FELA judgments in the 80-year coexistence of the RRTA and FELA. What BNSF is seeking in this case is a sea change in FELA law. Yet, BNSF identifies no change in the relevant statutes or regulations that compels taxation of FELA judgments now for the first time in over 80 years. Again, that speaks volumes about the merits and novelty of BNSF's arguments.

* * *

Even disregarding the dearth of authority to support BNSF's argument, the RRTA and Internal Revenue Code make clear (and have done so for decades) that RRTA taxes are not due on FELA general verdict awards of damages for physical injury. "The primary rule of statutory interpretation is to effectuate legislative intent through reference to the plain and ordinary meaning of the statutory language." *Bateman v. Rinehart*, 391 S.W.3d 441, 446 (Mo.banc 2013). When the statutory language is plain, the Court must enforce it according to its terms. *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009).

The RRTA is Chapter 22 of the Internal Revenue Code (26 U.S.C. §§3201–3241).

Section 3201 establishes the RRTA tax on employees. Resp. App. A1. In pertinent part it provides:

> In addition to other taxes, there is hereby imposed on the income of each employee a tax equal to the applicable percentage of the compensation received during any calendar year by such employee for services rendered by such employee.

26 U.S.C. §3201(a) and (b)(1). This is similar to the Federal Insurance Contributions Act (FICA), which provides:

> In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages ... received by him with respect to employment....

26 U.S.C. §3101(a) and (b).; Resp. App. A8.

The RRTA provides for the deduction of RRTA taxes only from railroad employee "compensation" as follows:

> The taxes imposed by section 3201 shall be collected by the employer of the taxpayer by deducting the amount of the taxes from the compensation of the employee as and when paid.

26 U.S.C. §3202(a); Resp. App. A2.

For the reasons specified below, RRTA taxes are not due on personal injury judgments such as Mickey's because the payment of those judgments is neither "income" nor "compensation."

A. Judgments that include any award for personal physical injuries are not "income" under the Internal Revenue Code or the RRTA.

The RRTA imposes its taxes "on the *income* of each employee[.]" 26 U.S.C. §3201(a) and (b). Thus, if the payment of a judgment is not "income" there is nothing on which to "impose[]" the RRTA tax.

The Internal Revenue Code specifically provides that the term "income" *excludes* "the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness[.]" 26 U.S.C. §104(a)(2) [Resp. App. A26]; *see also* 26 C.F.R. §1.104-1(c); *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 496 (1980). In injury cases that include damages awards for personal physical injuries and any amount allocable to lost wages, the IRS has consistently ruled that the *entire* award is *not taxable*. Rev. Rul. 85-97, 1985-2 C.B. 50 (July 1985); Rev. Rul. 61-1, 1961-1 C.B. 14 (Jan. 1961); Resp. App. A27–A30. This principle also was recognized by the Supreme Court in *Commissioner of Internal Revenue v. Schleier*, 515 U.S. 323 (1995). In a personal physical injury case such as an automobile collision, the Supreme Court noted, even the portion of a settlement attributable to lost wages is excluded from income under §104(a)(2) "as long as the lost wages resulted from time in which the taxpayer was out of work as a result of her injuries." *Id.* at 329.

Damages awards that are not taxable income are not subject to FICA withholding taxes. *Dotson v. United States*, 87 F.3d 682, 689–90 (5th Cir. 1996)(citing *Rowan Cos. v. United States*, 452 U.S. 247, 254 (1981), and *Anderson v. United States*, 929 F.2d 648,

654 (Fed. Cir. 1991)). Since a wage is a subset of income, if a payment is not income it cannot be a wage. The IRS has recognized and explained this principle in a detailed Memorandum from the Office of Chief Counsel (October 22, 2008)(non-precedential).[4] "Amounts excludable from gross income under §104(a)(2) ... are not wages for FICA and income tax withholding purposes." *Id.* at 8. The IRS confirmed this again in its audit guide, which although not an official pronouncement of the law or the position of the IRS, is nonetheless indicative of the long-standing recognition of this principle. Lawsuits, Awards, and Settlements Audit Techniques Guide (5/2011).[5] "There is general agreement that to the extent damages are excludable from gross income, they are not subject to employment taxes." *Id.* at 14. The American Association for Justice provides a detailed history and explanation of this principle in the amicus brief it filed in the court of appeals. *Mickey v. BNSF Ry.*, No. ED98647, Br. Of The Am. Ass'n For Justice As *Amicus Curiae* In Support Of Respondent And In Support Of Affirmance at 10–14 (Apr. 9, 2013)(AAJ Br.). The RRTA is the railroad version of FICA. *Standard Office*, 819 F.2d at 1373. The same non-taxability rule for personal physical injury awards under FICA thus apply equally to the RRTA.

The principle that FELA awards for physical injuries are not taxable income is well-settled and long-standing. *Liepelt*, 444 U.S. at 496; 26 U.S.C. §104(a)(2); *see* AAJ Br. 3–7. It is such a long-recognized principle that it is enshrined in the Missouri Approved

[4] http://www.irs.gov/pub/lanoa/pmta2009-035.pdf

[5] http://www.irs.gov/pub/irs-utl/lawsuitesawardssettlements.pdf

Instructions for FELA verdicts. Juries are specifically instructed (if requested by the railroad) that their damages award, no matter what is included, is *not taxable*. MAI 8.02, note 3 ("*Any award* you make is not subject to income tax")(emphasis added). As §3201 of the Code makes clear, if it is not taxable as "income", then there is nothing on which to "impose[]" RRTA taxes. 26 U.S.C. §3201(a). Mickey's judgment indisputably is an "award of any damages ... on account of personal physical injuries[.]" 26 U.S.C. §104(a)(2). No RRTA tax was due upon BNSF's partial satisfaction of Mickey's judgment.

B. Judgments for personal physical injuries are not "compensation" under the RRTA.

The §3201 RRTA tax is calculated as the applicable percentage of the "compensation received during any calendar year by such employee for services rendered by such employee." 26 U.S.C. §3201(a) and (b); 26 C.F.R. §31.3201-1; Resp. App. A5. A railroad can deduct RRTA taxes only from "the compensation of the employee as and when paid." 26 U.S.C. §3202(a); Resp. App. A2. If the employee receives no "compensation", there is nothing on which to impose the applicable percentage to calculate the RRTA tax and nothing from which to withhold the tax. For the following reasons, payment of a judgment for physical injuries is not "compensation" under the RRTA.

"Compensation" under the RRTA means only "*remuneration* paid to an individual *for services rendered* as an employee to one or more employers." 26 U.S.C. §3231(e)(1) (emphasis added); Resp. App. A2–A4. This is confirmed by §3201's reference to

"compensation received ... *for services rendered* by such employee." By limiting the broader term "compensation" to the more restricted "remuneration ... for services rendered", the RRTA specifies that the tax is due only for "money paid for work or a service", which is the common definition of "remuneration." *See, e.g.*, *United States ex rel. Osheroff v. Tenet Healthcare Corp.*, No. 09-22253, 2012 U.S. Dist. LEXIS 96434 at 30 (S.D.Fla. July 12, 2012)("The Oxford English Dictionary defines the lower-case term 'remuneration' as 'money paid for work or a service.'"); *In re Network Assocs. Sec. Litig*., 76 F.Supp.2d 1017, 1043 (N.D.Cal. 1999)("remuneration is generally defined as payment for services performed", quotation marks and citations omitted); *Allegheny Ludlum Corp. v. Unemployment Comp. Bd. of Review*, 634 A.2d 587, 589 (Pa. 1993)("remuneration is generally defined as payment for services performed"); *Mowry v. State ex rel. Wyo. Ret. Bd*., 866 P.2d 729, 731 (Wyo. 1993)(severance pay is not "remuneration" because it is not compensation for services rendered).

A payment also is not "compensation" unless it is paid to an "employee." One is not an employee of a railroad unless he is "in the service" of the railroad, 26 U.S.C. §3231(b), meaning that he is "subject to the continuing authority of [the railroad] to supervise and direct the manner of rendition of his service...for compensation[,]" 26 U.S.C. §3231(d)(1), and actually "renders such service for compensation[,]" 26 U.S.C. §3231(d)(2); Resp. App. A2; *see also* 26 C.F.R. §31.3231(b)-1(a); Resp. App. A5–A6.

Mickey terminated his employment with BNSF in September 2007. *Mickey*, 358 S.W.3d at 140; *Mickey v. BNSF Ry.*, No. ED95110, Transcript on Appeal (*Mickey* Tr.)

270:2–11.[6] After that point, he was not "subject to the continuing authority of [BNSF] to supervise and direct the manner of rendition of his service" and did not "render such service for compensation." 26 U.S.C. §3231(d). Therefore, he was not an "employee" at the time he received BNSF's partial payment of $368,481 in 2012, nor during the time that BNSF reported Mickey supposedly "earned" this "compensation." LF 99 (reporting "creditable compensation" for March 2008 through March 2009). Moreover, that payment was not "for services rendered" to BNSF, 26 U.S.C. §3231(e)(1); it was payment of the damages resulting from the personal physical injuries BNSF caused Mickey. Thus, BNSF's 2012 payment was not "compensation" subject to withholding under §3202(a) or taxation under §3201.

The RRTA also specifically excludes from "compensation" "the amount of any payment ... made to, or on behalf of, an employee ... on account of sickness or *accident disability* or medical or hospitalization expenses in connection with sickness or accident disability[.]" 26 U.S.C. §3231(e)(1)(i) (emphasis added); Resp. App. A3. Although §3231(e)(1)(i) refers to payments made "under a plan or system established by an employer which makes provision for his employees generally", IRS regulations clarify that the exclusion applies to any such payments "even though not made under a plan or system" that are made over 6 months after "the last calendar month in which such employee worked for such employer[.]" 26 C.F.R. §31.3121(a)(4)-1; Resp. App. A8.

[6] The Court may take judicial notice of the legal file transcript of the prior appeal. *State v. Dillon*, 41 S.W.3d 479, 482 (Mo.App. 2000).

That FICA regulation is incorporated into the RRTA regulations by 26 C.F.R. §31.3231(e)-1(a)(1) ("The term compensation has the same meaning as the term wages in section 3121(a), determined without regard to section 3121(b)(9), except as specifically limited by the Railroad Retirement Tax Act (chapter 22 of the Internal Revenue Code) or regulation."); Resp. App. A7.

RRTA tax withholding under §3202(a) thus is not due from payments made to a railroad employee on account of a disability caused by the railroad. That is precisely what the jury awarded in this case. *Mickey*, 358 S.W.3d at 140–41. The jury's award was a "sum" the jury believed would "fairly and justly compensate" Mickey for the "damages" they believed Mickey "sustained" and would be "reasonably certain to sustain in the future" as the result of BNSF's negligence. LF 174 (MAI 8.02). BNSF's partial payment of Mickey's judgment, made more than 6 months after Mickey stopped working for BNSF, thus was a payment on account of Mickey's accident disability and was not a payment of "compensation" subject to withholding of RRTA taxes (were any even due). In addition, §3231(e)(1) is a detailed statutory definition of "compensation." Nowhere does it include satisfaction of personal physical injury judgments under the FELA within the scope of "compensation" for purposes of RRTA taxation or withholding, despite the long history of such FELA judgments. That further confirms that personal physical injury awards such as Mickey's are not subject to RRTA taxation.

* * *

There is no authority for BNSF to withhold RRTA taxes from its partial satisfaction of Mickey's judgment. Even had BNSF paid those taxes before the trial court entered its

judgment on Safeco's bond (it did not), that would not be satisfaction of Mickey's judgment. Since BNSF has not fully satisfied Mickey's judgment, the trial court's judgment in favor of Mickey on Safeco's bond was correct and must be affirmed.

C. BNSF's arguments for the taxability of Mickey's judgment rely upon inapposite statutes and sources.

Instead of addressing the plain and ordinary meaning of the text of the RRTA, BNSF relies on inapposite statutes and sources to argue that its partial satisfaction of Mickey's judgment was taxable. Primarily, BNSF relies on a statute that is not even part of the Internal Revenue Code—45 U.S.C. §231(h)(2). *See* Substitute App. Br. at 16, 35, 37–38; Resp. App. A8–A9. Section 231(h)(2) only defines "compensation" for purposes of the Railroad Retirement Act of 1974 and the retirement benefits due to employees thereunder. 45 U.S.C. §§231–231v (Retirement Act). The United States as BNSF's *amicus* commits this same error, only more boldly and misleadingly, stating that §231(h)(2) actually is part of the RRTA. *Mickey v. BNSF Ry.*, No. ED98647, Br. Of The U.S. As *Amicus Curiae* In Support Of Appellant And In Support Of Reversal at 6–7 and n.4 (Jan. 8, 2013)(Amicus Br.). The RRTA has its own definition of "compensation" for RRTA taxation purposes (26 U.S.C. §3231(e)(1)) and there is need to borrow from the definition from the Retirement Act.

The Retirement Act and the RRTA also are independent statutes that do not need to be construed symmetrically. The Retirement Act provides retirement benefits to railroad employees (45 U.S.C. §§231a–231e) and is administered by the Railroad Retirement Board (45 U.S.C. §231f) (RRB). The RRTA is Chapter 22 of the Internal Revenue Code

and is administered by the IRS. In this manner, the statutes are similar to the Social Security Act and FICA. The Supreme Court has clarified that the Social Security Act and FICA are independent and not *in pari materia*.

> Although Social Security taxes are used to pay for Social Security benefits in the aggregate, there is no direct relation between taxes and benefits at the level of an individual employee.... Social Security tax 'contributions,' unlike private pension contributions, do not create in the contributor a property right to benefits against the government, and wages rather than [tax] contributions are the statutory basis for calculating an individual's benefits.

United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 212–13 (2001) (quotation marks omitted). Thus, there was no basis for "symmetrical construction of the 'wages paid' language in the discrete taxation and benefits eligibility contexts" of Social Security and FICA. *Id.* at 213. Likewise, there is no basis for a "symmetrical construction" of the RRTA and the Retirement Act definitions of "compensation", as BNSF and its *amicus* contend.

There also is no direct relation between taxes deducted from an employee's wages under the RRTA and retirement benefits paid to railroad employees under the Retirement Act. The taxes collected from an employee's wages do not directly fund the retirement benefits the employee ultimately receives. *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 574–75 (1979)("the taxes paid by and on behalf of an employee do not necessarily correlate with the benefits to which the employee may be entitled"). Retirement benefits are based

on years of service and levels of compensation, not on taxes collected. 45 U.S.C. §§231a–231b; Resp. App. A9–A26. Retirement benefits are based on the dates when the compensation is *earned*. 45 U.S.C. §231(h)(1). RRTA taxes, however, are calculated at the tax rates in effect when the compensation is *paid*, not when the compensation was earned. 26 U.S.C. §3202(a). The Tier 2 tax rate under the RRTA (§3201(b)) is not even employee-specific. Instead, it is calculated annually based on an "account benefits ratio" of the total assets in the Railroad Retirement Account and National Railroad Retirement Investment Trust relative to benefits and expenses paid each year. 26 U.S.C. §3241; Resp. App. A4.

How the RRB defines "compensation" for *benefits* purposes in the event of a payment for personal injury and for "time lost" thus is wholly irrelevant to whether that is "compensation" for tax purposes and there is no need for a "symmetrical construction" of those terms in the different statutes. Moreover, an employee who has already attained sufficient years of service and compensation to already receive retirement benefits (such as Mickey) has no desire or need to have his FELA judgment treated as "compensation" for benefits purposes (and much less so for tax purposes).

Because of this distinction between the Retirement Act and the RRTA, BNSF's reliance on publications of the Retirement Act administrator (the RRB) is misplaced. BNSF relies on an opinion letter from the RRB General Counsel. Sub. App. Br. 17; LF 144. That General Counsel expressly acknowledges, however, that he has no authority to opine on the Tax Act:

> With respect to any employment taxes due under the Railroad Retirement

> Tax Act (26 U.S.C. §§ 3231–3241), I must advise that the Tax Act is administered by the Internal Revenue Service of the Department of Treasury. Consequently, *I have no authority to provide advice concerning taxpayer obligations arising under that Act*.

LF 144 (emphasis added). Thus, the RRB concedes it has no authority over RRTA taxes. Its publications, then, have no bearing on whether BNSF was obligated to pay taxes on Mickey's judgment, much less whether withholding of those taxes constitutes a satisfaction of that judgment.

The General Counsel letter also is factually inapposite. It addresses a *special* jury verdict in which the jury assigned specific amounts to past and future wage loss. LF 141, 143. The verdict in this case was a *general* verdict for personal physical injuries. LF 20; *see infra* at 28. Furthermore, the plaintiff in that letter was still an employee of the railroad. LF 141. Mickey was not. If BNSF wanted a special verdict or special interrogatories to determine how much (if any) of the jury's award was "pay for time lost" and thus taxable "compensation", it was obligated to ask for it before the trial court entered judgment.

The May 2011 RRB publication on which BNSF and its *amicus* rely is inapposite because it addresses "*agreements* between employers and employees involving pay for time lost" that are "intended to provide an employee with additional months of creditable service needed to qualify for railroad retirement benefits" and advises on how to structure those agreements correctly. LF 112 (emphasis added); *cf.* Sub. App. Br. 18; Amicus Br. 9. There was no such agreement in this case and Mickey had no interest in increasing his

months of creditable service; he already achieved the maximum months of creditable service and was already receiving his benefits. The RRB has specifically noted the difference between settlements in which the railroad and employee *agree* to allocate some of the settlement to pay for time lost and judgments that contain no such allocation. "Unlike the case of a settlement of a personal injury action, the payment to an employee by way of a judgement does not automatically result in a pay for time lost allocation." Pay for Time Lost From Regular Railroad Employment, Form IB-4 (09-96) at 8.[7] BNSF also relies on an aside in the 1961 IRS Revenue Ruling, Sub. App. Br. 19, but that ruling is factually distinct because the employee *elected* to apportion part of the settlement payment "to 'time lost' for the purpose of computing railroad retirement credit", LF 101. Mickey did not so elect and had no reason to do so.

BNSF's and its *amicus*'s sources stand for no more of a proposition than that if the railroad and employee agree, or if a judgment so specifies, a payment of an FELA claim can be allocated to "compensation" under the Retirement Act and arguably be taxable under the RRTA. Mickey did not so agree in this case and his judgment did not so specify. BNSF perhaps could argue that the jury should have made that allocation through special interrogatories. *See* LF 141 (RRB letter addressing "a special verdict" specifying amounts of "lost earnings"). But BNSF did not ask for such special interrogatories and cannot do so now. Mickey was not required to request that allocation. Until now it has never even been suggested that a general verdict FELA judgment could

[7] http://www.rrb.gov/pdf/PandS/ib4.pdf

be subject to taxation of any kind unless specifically allocated to items other than "pay for time lost." Mickey thus had no reason to ask the jury to specifically allocate its damages award.

BNSF and its *amicus* also cite the RRTA indemnification statute to contend that BNSF is free from liability for making RRTA withholdings. Sub. App. Br. 20–22 (Argument C, citing 26 U.S.C. §3202(b)); Amicus Br. 8–10.That statute is irrelevant because Mickey is not suing BNSF for unpaid remuneration for services rendered. Instead, Mickey is seeking payment on Safeco's bond for the balance of the judgment amount due him. BNSF itself can seek a refund of its erroneous tax payment. 26 C.F.R. §31.3202-1(c), §31.6402(a)-2(a).

D. BNSF's arguments for the taxability of Mickey's judgment rely upon inapposite and incorrect cases.

BNSF's cases do not support its argument. Many of those cases are trial court orders from other jurisdictions. Such decisions are neither binding nor persuasive. *Craft v. Phillip Morris Cos.*, 190 S.W.3d 368, 376 (Mo.App. 2005) (citing *State v. Goodwin*, 43 S.W.3d 805, 814 (Mo.banc 2001)). They also are factually inapposite or incorrect for the following reasons.

1. Cases regarding the taxability of exclusively lost wage awards in non-FELA cases have no bearing on Mickey's personal physical injury FELA award.

BNSF's two federal cases—*Hance* and *Cheetham*, Sub. App. Br. 8—are factually inapposite because they do not concern personal physical injury awards under the FELA,

but instead specific awards of employment compensation that are much more clearly subject to taxation under the RRTA. *Hance* was a wrongful discharge claim under the Uniformed Services Employment and Reemployment Rights Act of 1994 (38 U.S.C. §§ 4301–4333) and addressed an "award of damages equivalent to Railroad Retirement Tax Act (RRTA) contributions that Norfolk Southern would have made on Hance's behalf had he not been discharged." *Hance v. Norfolk S. Ry.*, 571 F.3d 511, 515 (6th Cir. 2009). It does not concern a personal physical injury award or the FELA. *Hance* holds only that "awards of back pay are subject to employment taxes as if they were wages" and, specifically are subject to RRTA tax withholding. Mickey's judgment was not an award of back pay and his case was not a wrongful termination case. *Hance* thus is off point. *See also Windom v. Norfolk So. Ry.*, No. 10-407, 2012 U.S. Dist. LEXIS 173477 at 7 n.5 (M.D.Ga. 2012) (distinguishing *Hance*).

Cheetham similarly concerned an award of lost wages under the Family and Medical Leave Act. *Cheetham v. CSX Transp.*, No. 06-704, 2012 U.S. Dist. LEXIS 49659 at 2 (M.D.Fla. Feb. 13, 2012). Following the same precedent cited by *Hance*, *Cheetham* held only that the railroad employee's back pay award under the FMLA was subject to RRTA tax withholding. LEXIS at 6–25; *cf.* Sub. App. Br. at 27–31. *Cheetham* is inapposite for the same reasons as *Hance*.

BNSF's other cases are distinguishable for similar reasons. *Nielsen v. BNSF Ry.*, a trial court decision from Multnomah County, Oregon (LF 135–36), concerned only the question of whether a specific award of lost wages was subject to RRTA tax withholding. Sub. App. Br. at 22. BNSF waived its right to have the jury to specify what part of

Mickey's award (if any) was an award of lost wages. *Noel v. New York State Office of Mental Health Central New York Psychiatric Center*, was an employment discrimination case award of back and front pay. 697 F.3d 209, 212–13 (2d Cir. 2012); *cf.* Sub. App. Br. at 31–32. *Gerstenbluth v. Credit Suisse Securities (USA) LLC* also was an employment discrimination case for payment of taxable wages. No. 11-2525, Doc. 44, 2012 U.S. Dist. LEXIS 144833 at 3–4 (E.D.N.Y. Sep. 28, 2012); *cf.* Sub. App. Br. at 30. None of those cases included damages awards for serious and career-ending physical injuries such as Mickey suffered. Instead they all concern awards in the nature of remuneration for services rendered, taxable as income. An FELA judgment—even if it includes compensation for lost wages as well as physical injury—is not taxable income. 26 U.S.C. §104(a)(2); 26 C.F.R. §1.104-1(c); *Liepelt*, 444 U.S. at 496; Rev. Rul. 85-97. This distinction is important, because damages not included in the tax code's definition of "income" are not "wages" and "are not taxable under FICA." *Dotson*, 87 F.3d at 689–90 (citing *Rowan*, 452 U.S. at 254, and *Anderson*, 929 F.2d at 654).

The taxability of lost *future* wages is controversial and disputed by other decisions, whose reasoning is more persuasive on this unique point. *See Dotson*, 87 F.3d at 690 (front pay replaces potential wages but is not wages); *Newhouse v. McCormick & Co.*, 157 F.3d 582, 585–86 (8th Cir. 1998); *Ark. Dept. of Health & Human Servs. v. Storey*, 269 S.W.3d 803 (Ark. 2007); *Lisec v. United Airlines*, 11 Cal.Rptr.2d 689, 693 (Cal.App. 1992)("The statutes do not place upon a *former* employer the obligation to withhold taxes from an award of damages."). The United States' additional case cites likewise are all employment-related cases that did not concern any physical injury, but instead only

wage-related claims for compensation such as back pay that is subject to income tax. *See* Amicus Br. 11; *see, e.g.*, *Noel*, 697 F.3d at 213 n.4 (citing same cases for principle that back pay is taxable income).

2. *Heckman* and *Phillips* are poorly reasoned and thus are not persuasive.

BNSF's out-of-state decisions are not binding authority. *E.g.*, *Nat'l Union Fire Ins. Co. v. Maune*, 277 S.W.3d 754, 759 (Mo.App. 2009). Nor are they persuasive. In *Heckman v. Burlington N. Santa Fe Ry.*, 286 Neb. 453 (2013),[8] the Nebraska Supreme Court accepted BNSF's argument in whole, relying on the same inapposite sources distinguished above. 286 Neb. at 462–65 (citing 45 U.S.C. §231(h)(2), *Cheatham*, and *Hance*, among others). It did not even conduct the first step in the analysis of determining whether satisfaction of the judgment constitutes "income" under the RRTA or §104(a)(2) of the Internal Revenue Code. *See supra* at 10. It relied on the Retirement Act's definition of "compensation" without considering the RRTA's separate definition and the differences between the acts. 286 Neb. at 462–63; *cf. supra* at 12. *Heckman* also distinguished the appellate court's decision herein as being contrary to Nebraska law. 286 Neb. at 460.

BNSF's second case—*Phillips v. Chicago, Central & Pacific R.R.*—is a trial court order from Pottawattamie County, Iowa, that does not even have persuasive value. *Craft*, 190 S.W.3d at 376. It is not even clear from that order whether the plaintiff suffered

[8] http://supremecourt.ne.gov/sites/supremecourt.ne.gov/files/sc/opinions/s12-335.pdf

physical injuries. Like *Heckman*, it does not address whether satisfaction of that judgment constituted "income" under the RRTA and Internal Revenue Code. Like *Heckman*, it erroneously relied instead on 45 U.S.C. §231(h)(2) and *Cheatham*, among others. BNSF App. A074–75. Even *Heckman* found *Phillips* inapposite. *Heckman*, 286 Neb. at 460.

In contrast to *Heckman* and *Phillips*, the U.S. District Court for the Middle District of Georgia found an FELA award specifically for lost wages to be not subject to RRTA taxation and rejected the railroad's motion to satisfy judgment for having withheld such taxes. *Windom*, 2012 U.S. Dist. LEXIS 173477 at 3–9. As with BNSF here, the railroad there failed to demonstrate "that it has been held liable for any such contributions or even that it will be held liable for such contributions." *Id.* at 6. The court also noted that the railroad should have brought the issue of taxability and a related offset issue to the court's attention at or before trial, and that a post-judgment motion was not the proper vehicle to raise the issues. *Id*. at 8 n.7, 13–15. That is the same conclusion of the court of appeals here. *Mickey* Op. at 9–11.

Heckman and *Phillips* contain no reasoning or authority that could persuade the Court to find RRTA taxes due on satisfaction of judgments for physical injuries under the FELA, particularly in light of the overwhelming authority to the contrary described above.

E. The opinion of the United States as *amicus curiae* is entitled to no deference and is poorly reasoned and unpersuasive.

The Department of Justice on behalf of the United States of America filed an amicus brief in support of BNSF in the court of appeals. That brief is entitled to no deference.

First, as shown *supra*, under the plain and ordinary meaning of the statutes, payment of Mickey's judgment is not "income" or "compensation" and thus is not subject to RRTA taxes. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984). Second, even as to unclear statutes, deference is due only to the interpretations of administrative agencies to whom Congress has delegated authority "to elucidate a specific provision of the statute by regulation." *Id.* at 844; *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001). Congress delegated no authority to the Justice Department to interpret the RRTA; that is the province of the Secretary of the Treasury and its delegate, the Commissioner of Internal Revenue. 26 U.S.C. §7805(a); *Cleveland Indians*, 532 U.S. at 219.

BNSF's reliance on *Chase Bank USA, NA v. McCoy*, 562 U.S. ___,131 S.Ct. 871 (2011), to compel deference to the United States' brief thus is misplaced. The Supreme Court did not give deference to a Justice Department amicus brief on behalf of the United States, as BNSF seeks here. Instead, the Court deferred to an interpretation by the Board of Governors of the Federal Reserve System regarding an ambiguity in its own regulation. 131 S.Ct. at 880. That does not apply here. Indeed, the Justice Department itself did not even argue that the opinions in its brief were entitled to any deference.

The opinion of the United States also is entirely unpersuasive. It does little more than mimic BNSF's argument. Like BNSF, the United States does not even address the question of whether payment of Mickey's judgment constitutes "income" under the RRTA, without which there is no tax to impose. The United States additionally relies on

an RRTA regulation that it contends require taxation of payments for time lost. Amicus Br. 7–8 (citing 26 C.F.R. §31.3231(e)-1(a)(3)–(4)). That reliance is misplaced. That regulation only defines "compensation" and payment of Mickey's judgment is not "compensation" for the reasons stated *supra* at 12. The regulation does not even refer to FELA awards of damages for personal physical injuries. The regulation includes within "compensation" amounts that are "paid for an identifiable period during which the employee is absent from the active service of the employer" and "paid to an employee for loss of earnings during an identifiable period as the result of the displacement of the employee to a less remunerative position or occupation as well as pay for time lost." That does not apply here for two reasons. First, Mickey's judgment does not assign any amount of the damages award to "an identifiable period" of lost wages. Second, Mickey ceased to be a BNSF "employee" long before BNSF partially paid his judgment in 2012. *See supra* at 13–14.

The United States also baldly and erroneously states that 45 U.S.C. §231(h)(2) and 26 U.S.C. §3202(a) "require[] RRTA taxes to be withheld from any damages award that compensates for time lost unless the award is specifically apportioned to factors other than time lost." Amicus Br. 14. Section 231(h)(2) is not even part of the RRTA or the Internal Revenue Code and neither §231(h)(2) nor §3202 even refer to damages awards or judgments entered on jury verdicts. Consequently, there is no Supremacy Clause issue in this case, as the United States asserts. Amicus Br. 14–17. Moreover, no statute, regulation, revenue ruling, or case has ever put the burden on an FELA plaintiff to demonstrate that a jury's award of FELA damages is for anything other than "time lost."

Cf. id. at 14. It would be particularly unjust to impose that burden on Mickey *now*, as the United States insists, long after the case was submitted to the jury, long after the trial court entered judgment on that verdict, and long after the appellate court affirmed that judgment in every respect.

F. There is no basis for concluding that the jury's award of damages was all or predominantly "pay for time lost."

BNSF contends that the entire jury award of $345,000 in damages for Mickey's injuries is all "pay for time lost" and subject to RRTA taxation. Sub. App. Br. at 5. In fact, BNSF reported that entire amount to the RRB as taxable "compensation" from March 2008 through March 2009 (LF99), even though Mickey's employment with BNSF terminated in 2007 and he and his wife were already receiving his Retirement Act benefits. (In fact, one effect of BNSF's report, if allowed to stand, would be to compel Mickey to repay the benefits he and his wife received in those thirteen months.) That contention contradicts the evidence in this case.

Mickey sought all of the damages he suffered from BNSF's negligence, only part of which concerned his lost earning capacity. Mickey claimed that he suffered extensive physical injuries, LF 15–16, and the jury found he suffered permanent disabilities in his back and knees, *Mickey*, 358 S.W.3d at 140–41. He had three lumbar disk failures, muscle spasms, and withering of the muscle in his right leg. *Mickey v. BNSF Ry.*, No. ED95110, Tr. 398:7–25, 402:17 – 404:21, 413:2–19, 415:3–14, 419:9 – 421:5, 421:23 – 422:9. He had arthritis and crepitus in both knees and a valgus deformity because of the disintegration of the knees resulting from the wear and tear of his railroad work, which

required future knee replacement surgery. *Id.*, Legal File 835 (14:3 – 17:13), 835–36 (17:17 – 18:4), 836 (20:17 – 21:7), 839 (30:14 – 31:18), 840 (34:4–8); Tr. 541:6 – 542:21. Mickey also sought to provide health insurance protection for his wife, who was otherwise uninsured. LF 120 (547:1–25). Mickey's "lost wages" were not just what he would have earned at BNSF had he not been injured, but included the fact that Mickey was disabled from performing most any work and thus providing himself the amount of net income he could have earned but for the injuries BNSF caused him. LF 121 (594:4–9).

Although Mickey's closing argument identified $54,000 as Mickey's average pre-injury wage and sought over 9 years of that wage (LF 122 (926:2–12)), it also identified the $14,000 value of insurance for Mickey's wife, the cost of his past medical bills, and the cost of his future medical bills including an estimated $50,000 for knee replacement surgery (*id.*, 926:13–22). More importantly, but equally compensable, were Mickey's non-monetary damages, including his physical injuries, his inability to work, inability to enjoy life, and the pain and suffering Mickey suffered and would continue to suffer. LF 122–23 (926:23 – 927:17).

Given all of this evidence, it is impossible to conclude that the jury's damage award of $345,000 was *exclusively* an award of wages Mickey would have earned at BNSF but for his injuries, or even that *any portion* of that award was for such wages. (The United States errs in contending "there is no dispute that the award of damages in issue included payment for time lost[.]" Amicus Br. 16). What is included within its verdict "is a matter forever relegated to the bosom of the jury." *Anglim v. Mo. Pac. R.R.*, 832 S.W.2d 298,

309 (Mo. 1992). There is no basis on which BNSF can claim that the *entire* $345,000 is "compensation" subject to RRTA taxation. The time for BNSF to get clarification on how much (if any) of this damage award constituted taxable "compensation" was before the jury returned its verdict. Now, long after that verdict has been affirmed by the court of appeals, is not that time.

Allowing employees to designate a portion of their FELA settlements or judgments as compensation for specific periods of time under the Retirement Act makes sense to help provide benefits to railroad employees, a salutary purpose in line with the salutary purposes of the FELA and Retirement Act. *See McBride*, 131 S.Ct. at 2636 (recognizing humanitarian and remedial goals of FELA). It also makes sense that the same amounts the employee designates as such compensation be taxed under the RRTA. But it makes no sense to compel an employee against his wishes to have all of his personal injury damages be deemed taxable compensation when that provides him no benefit under the Retirement Act and especially when, as here, that only harms the employee by forcing him to return disability payments he already had been receiving. It also is nonsense to hold that employee liable, as BNSF seeks here, for failing to anticipate the railroad's unfounded attempt to change the law on taxation of FELA judgments in not requesting special interrogatories or a special verdict to specify that no part of the jury's damages award is "pay for time lost." For all of the reasons specified above, BNSF's arguments should be rejected.

CONCLUSION

There is no merit to this appeal. The judgment of the trial court should be affirmed so that Lawrence Mickey can finally receive payment of the damages the jury awarded him over three years ago.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief (1) includes the information required by Rule 55.03, (2) complies with the limitations contained in Rule 84.06(b), (3) contains 8,388 words, and is typed in Times New Roman 13 point font.

I certify that the electronic copy of this Brief has been scanned for viruses and that it is virus-free.

/s/ Michael A. Wolff

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I certify that this brief was served on November 19, 2013 by electronic filing on all attorneys of record, who are registered users.

/s/ Michael A. Wolff